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IN THE

Supreme Court of The United States

October Term, 1997

STATE OF NORTH CAROLINA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ROANOKE RIVER BASIN ASSOCIATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE CITY OF VIRGINIA BEACH, VIRGINIA IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Leslie L. Lilley
City Attorney
William M. Macali
Deputy City Attorney
City of Virginia Beach
City Hall Building, Room 260
Municipal Center
Virginia Beach, Virginia 23456
(757) 427-4531

George A. Somerville
(*Counsel of Record*)
Samuel M. Brock III
Mays & Valentine, L.L.P.
1111 East Main Street
Post Office Box 1122
Richmond, Virginia 23218-1122
(804) 697-1291

M. Scott Hart
Mays & Valentine, L.L.P.
4425 Corporation Lane, Suite 420
Virginia Beach, Virginia 23462
(757) 518-3204

Attorneys for Respondent City of Virginia Beach, Virginia

Balmar Legal Publishing Services, Washington, D.C., (202) 682-980

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a withdrawal of water in one State, which causes a reduction in the total amount of water that flows over a downstream dam in another State, is a "discharge into the navigable waters" that originates in the downstream State within the meaning of Section 401(a)(1) of the Clean Water Act.

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BRIEF FOR THE CITY OF VIRGINIA BEACH, VIRGINIA IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

The City of Virginia Beach, Virginia, intervenor below, submits this brief in opposition to petitions for writ of certiorari filed by the State of North Carolina and the Roanoke River Basin Association (RRBA), Nos. 97-836 and 97-839, respectively.

STATEMENT OF THE CASE

This case is a purely local controversy, between North Carolina and the City of Virginia Beach. It involves no federal usurpation of State powers under the Clean Water Act ("CWA"), nor any other issues of national significance. The power granted to the State by the CWA was exercised in this case by *Virginia*, which issued a § 401 certification for Virginia Beach's project because *Virginia* is the state where the project and its associated discharge are located. Nor does this case involve dam licensing or relicensing, but merely an amendment to an existing license. This is simply the latest, and hopefully the last, episode in a fifteen year crusade by North Carolina to prevent the largest city in Virginia from withdrawing drinking water from the Roanoke River in Virginia, before it can flow downstream into North Carolina. The only real issue involved here is whether North Carolina can use § 401 of the CWA to block a public water supply project located entirely in Virginia.

This case does not involve any novel or difficult questions of law, or any conflict between the circuits or with decisions of this Court. The legal question is whether Virginia Beach's water withdrawal, *in Virginia*, will "result in any discharge *into* the navigable waters" that "*originates*" in *North Carolina* within the meaning of the CWA, because it *reduces* the amount of water that flows over a downstream dam in North Carolina. The plain, clear and simple answer is no, as the Court of Appeals and FERC concluded.

The case also could have been decided on the further ground, not reached by the court or FERC, that North Carolina's claim to § 401 certification authority is barred by the doctrines of *res judicata* and collateral estoppel. The Secretary of Commerce held, in an administrative adjudication between Virginia Beach and North Carolina (which was affirmed by the United States District Court for the District of Columbia), that "*the project meets the requirements of the Clean Water Act*" and that "[t]he City has

obtained the necessary CWA federal permit and state certification." DA 1667[1] (emphasis in original).

Nature of the case

This case arises out of the construction and operation of Virginia Beach's public water supply project. The project was completed in November 1997. It begins at a water intake structure in the Pea Hill Cove arm of Lake Gaston, in Virginia. It delivers water to southeastern Virginia through a 76-mile pipeline across southern Virginia. No part of the project is located in North Carolina.

Virginia Electric and Power Company (VEPCO) and FERC are involved in this case because VEPCO owns Lake Gaston and operates it under a FERC license. Virginia Beach needed an easement from VEPCO to build and operate its intake structure in Lake Gaston. VEPCO's license required FERC's approval before it transferred any interest in its licensed project property. FERC granted VEPCO's application for that approval and amended its license to authorize construction and operation of Virginia Beach's project. The Court of Appeals denied petitions for review, in the decision challenged by the petitions for certiorari.

Construction of the City's water intake structure required discharges of dredged and fill materials into Lake Gaston, in Virginia. In 1983 and 1984, the City sought and obtained a permit from the U.S. Army Corps of Engineers (Corps) and a certification from the Virginia State Water Control Board (VSWCB), as required by §§ 404(a) and 401(a)(1) of the CWA, 33 U.S.C. §§ 1344 and 1341, respectively. It did not request a certification from North Carolina because the project would not result in the discharge of anything into the waters in North Carolina. The VSWCB certification included several conditions designed to protect water quality, including a 60 million gallons per day (mgd) cap on withdrawals. DA 27-31.

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[1] "DA" citations are to the Deferred Appendix filed in the Court of Appeals.

North Carolina did not suggest that the Corps permit required its certification under § 401(a)(1). North Carolina tried to block the Corps permit under § 401(a)(2), however, by asking EPA to determine that Virginia Beach's project might affect water quality downstream in North Carolina. Section 401(a)(2) provides that if EPA determines that a discharge which originates in one State "may affect . . . the quality of the waters of any other State," then the affected State may object to the issuance of a federal permit, which compels the licensing or permitting agency to hold a public hearing and to "condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements" or deny the permit. 33 U.S.C. § 1341(a)(2). EPA refused North Carolina's request that it find that Virginia Beach's project might affect water quality in North Carolina. DA 59-66.

VEPCO filed its FERC application in 1991. In 1994, more than three years later, North Carolina contended for the first time that its § 401 certification was necessary for FERC approval of Virginia Beach's project. Section 401(a)(1) provides, in pertinent part:

> Any applicant for a Federal license or permit to conduct any *activity* including, but not limited to, the construction or operation of facilities, which may result in any *discharge into the navigable waters,* shall provide the licensing or permitting agency a certification from the State in which the discharge *originates or will originate* . . . .

33 U.S.C. § 1341(a)(1) (emphasis added).

The "activity" at issue in this case is the construction and operation of Virginia Beach's water supply project. *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997), NC App. 16-17a[2]; *Virginia Electric and Power Co.*, 77 F.E.R.C. (CCH) ¶61,138 (1996) at 61,518, NC App. 116-18a. The

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[2] The State of North Carolina's Petition and the Roanoke River Basin Association's Petition are cited as NC Pet. and RRBA Pet., respectively, and the appendix to North Carolina's Petition as NC App.

identical activity was at issue in the earlier Corps proceeding. Pursuant to § 401(a)(3), the State certification given for the Corps' construction permit also sufficed for the FERC license amendment authorizing operation of the pipeline project. *Id.* at 61, 521, NC App. at 124-25a. *See, e.g., Keating v. FERC,* 927 F.2d 616 (D.C. Cir. 1991) (State certification for Corps permit satisfied certification requirement for FERC license).

North Carolina argues that operation of Virginia Beach's project results in discharges originating in North Carolina because it slightly reduces the average (but not the minimum) amounts of water flowing over Gaston Dam in North Carolina. FERC found, to the contrary, that the *operation* of the project -- the withdrawals of water from Lake Gaston -- would not result in *any* discharge into navigable waters, in North Carolina or elsewhere, and therefore that North Carolina's certification was not required. 77 F.E.R.C. at 61,517, NC App. 114-15a. The Court of Appeals agreed. 112 F.3d at 1188, NC App. 18a.

FERC also held, in an additional ground for decision that the Court of Appeals did not reach, that North Carolina's certification would not be required even if Virginia Beach's withdrawals would "result in [a] discharge" by reducing water flows over downstream dams, as North Carolina argued; because any such discharge would "originate" in Virginia, where the withdrawals took place. 77 F.E.R.C. at 61,518, NC App. 118-19a.

Related proceedings

Virginia Beach's Corps permit, under CWA § 404, and its State certification, under CWA § 401, are discussed *supra* at 3-4. The Corps permit was granted in 1984 and amended in 1988, following a judicial remand. The Corps' permit action ultimately was sustained by the U.S. District Court in Raleigh, North Carolina, and the Court of Appeals for the Fourth Circuit, and this Court denied review. *State of North Carolina v. Hudson,* 665 F. Supp. 428 (E.D.N.C. 1987) *(Hudson I); State of North Carolina v. Hudson,* 731 F. Supp. 1261 (E.D.N.C. 1990) *(Hudson II), aff'd, Roanoke River Basin Ass'n. v. Hudson,* 940

F.2d 58 (4th Cir. 1991) *(Hudson III), cert. denied*, 502 U.S. 1092 (1992).

In another related case, North Carolina and RRBA sued Virginia Beach in late 1990 to enjoin project construction pending FERC approval. The U.S. District Court in Raleigh granted the injunction, and Virginia Beach appealed. The Fourth Circuit reversed in part, allowing Virginia Beach to proceed with some limited, "critical path" construction. *State of North Carolina* v. *City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991). The injunction expired when FERC issued its final order in this case.

After VEPCO filed its application with FERC, in February 1991, North Carolina objected to Virginia Beach's project under the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(3)(A), thereby blocking the FERC approval. Virginia Beach and VEPCO appealed the objection to the Secretary of Commerce. On May 20, 1994, the Secretary overruled North Carolina's objection, concluding, like the Corps before him and FERC after him, that Virginia Beach's project is both necessary and environmentally sound. The Secretary expressly found "*that the project meets the requirements of the Clean Water Act*" and "[t]he City has obtained the necessary CWA federal permit and state certification." DA 1667 (emphasis in original). North Carolina sued to set aside the Secretary's decision, but it did not challenge his Clean Water Act findings. The reviewing court sustained the Secretary's decision. *North Carolina v. Brown*, 42 E.R.C. 1254 (D.D.C. 1995). North Carolina did not appeal.

Virginia Beach's public water supply project

With over 400,000 residents, Virginia Beach is the largest city in Virginia. It is part of the southeastern Virginia urban complex comprising the contiguous cities of Virginia Beach, Norfolk, Chesapeake, Suffolk and Portsmouth, which together have a population of approximately 1 million. DA 3156. The region, and Virginia Beach in particular, have

suffered from a water shortage since at least 1974 when the U.S. Senate Committee on Public Works asked the Corps of Engineers to study and recommend water supply options for the area. DA 358. Since 1977 Virginia Beach and other cities in the region have been required to impose water use restrictions on their citizens during several droughts, and water rationing during a severe drought in 1980-81. DA 3150-51; 397-98, 839. By 1992, Virginia Beach's population had so far outgrown its sole source, the City of Norfolk's "surplus" water supply, that it was forced to impose permanent year-round restrictions on outdoor water uses and a moratorium on new connections to its public water system. Those measures applied even during non-drought periods and remained in effect until the pipeline became operational in November 1997. DA 1043-48.

Following the 1980-81 drought, Virginia Beach decided to build a pipeline to Lake Gaston to solve the regional water supply problem, as recommended by the Congressionally mandated Corps study. The pipeline was sized to withdraw up to 60 mgd from Lake Gaston, to be allocated 48 mgd to Virginia Beach, 10 mgd to Chesapeake and 2 mgd to two smaller localities. DA 3171. The water from the project, together with previously existing supplies, was expected to meet the region's water needs through the year 2030. DA 3139.

Lake Gaston and the Roanoke River system

The Roanoke River rises in the Appalachian Mountains of Virginia. It flows southeasterly, crosses into North Carolina near Roanoke Rapids and empties into Albemarle Sound some 145 miles downstream of Lake Gaston. Approximately 64% of the entire watershed, and 73% of the watershed above Roanoke Rapids Dam, is in Virginia. The rest is in North Carolina. DA 3210-11.

Lake Gaston is the second in a series of three impoundments of the Roanoke River that are located along the border of Virginia and North Carolina. The largest and

farthest upstream of the three impoundments is Kerr Reservoir, a Corps of Engineers project operated for flood control, power generation and other purposes, including water supply. Lake Gaston begins at the base of Kerr Dam, and Roanoke Rapids Reservoir begins at the base of the Gaston Dam. The latter two are FERC licensed hydropower projects. DA 3210-13, 3218-19. (See maps at Appendix A.)

Flows in the Roanoke River are regulated by these dams and reservoirs. In general, the dams withhold water from streamflow during high natural flows and return it during periods of lower flow. DA 3210-21. This regulation makes flows more uniform, but they still fluctuate widely. The average flow below Roanoke Rapids Dam is 8,050 cubic feet per second (cfs) (or 5,194 mgd), DA 3212, and the lowest yearly average flow was 3,117 cfs (2,011 mgd) in 1981, DA 3266, 3275[3]. Instantaneous flows vary from just over 1,000 cfs (the wintertime regulated minimum), DA 3237, to 30,000 cfs or more (during floods), DA 3231. Virginia Beach's maximum withdrawal of 60 mgd equals 93 cfs -- about 1.2% of the average flow and 3% of the lowest average annual flow on record.

VEPCO's FERC license requires it to release specified minimum flows from Roanoke Rapids Dam at all times, to maintain water quality downstream. DA 3232-33, 3238-41. The required minimums are 2,000 cfs in May through September, 1,500 cfs in April and October, and 1,000 cfs in November through March. DA 3237.[4]

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[3] Cfs + 1.55 = mgd.

[4] By agreement among VEPCO, the Corps and North Carolina, VEPCO makes higher "augmented" releases during the striped bass spawning season, using water provided by the Corps from Kerr Reservoir storage. DA 3236-38. Contrary to RRBA's assertions, RRBA Pet. 9-10, Virginia Beach's withdrawals will not impair the ability to make these releases, even in the driest years, because Virginia Beach has purchased additional water storage in Kerr Reservoir which will be released to offset its withdrawals on the rare occasions they might otherwise cause the targets to be missed. DA 3296-99. As FERC (like the Corps and the

Virginia Beach's withdrawals will reduce the *total* amount of water that flows through the Gaston and Roanoke Rapids Dams, by a maximum of 93 cfs (60 mgd); but *they will not reduce the low flows at all.* Most of the water in Lake Gaston comes from Kerr Reservoir. The Corps' hydropower contracts require it to make releases from Kerr Reservoir which, together with local inflows to Lake Gaston and Roanoke Rapids Reservoir, average at least 545 cfs (352 mgd) more than VEPCO's minimum required releases at all times. *Hudson II*, 731 F. Supp. at 1263-64. Virginia Beach's 93 cfs maximum withdrawal will come from that "surplus," and VEPCO will maintain the minimum flows required by its license.

VEPCO's releases are governed by power demands and the minimum release conditions of its license. It generally releases only the minimums when power demands are low and stores the balance of the Kerr releases in Gaston and Roanoke Rapids Reservoirs to meet peak power demands. DA 3218-19; *Hudson II*, 731 F. Supp. at 1264. Releases into the lower Roanoke therefore follow a peak and valley pattern. DA 3231-32. VEPCO will not change its operations as a result of Virginia Beach's project, and the effect of the withdrawals will be simply to lower the peaks, but not the valleys. The same changes result from varying rainfall patterns, and would also result from withdrawals upstream of Lake Gaston, outside of FERC's jurisdiction.

North Carolina implies that the withdrawals will reduce flow by "almost ten percent," "during periods of low flow, when water quality is at greatest risk." NC Pet. 4. That is not true. North Carolina has simply compared Virginia Beach's 93 cfs maximum withdrawal to the 1,000 cfs *wintertime* regulated minimum. But Virginia Beach's withdrawals will *never* reduce the minimum flows, and even during the driest summers they will account for less than 4% of total flows.

Secretary of Commerce) concluded, "the project will not affect the reproductive success of striped bass in the Roanoke River." DA 3943.

(93 cfs ÷ 2545 cfs = 3.65%). And most water quality problems occur in the summer and early fall, when *natural* low flows coincide with high air and water temperatures. DA 3217-18. That is why higher (2,000 cfs) minimum releases are required in the warmer months; and as discussed above, at least 545 cfs more than the minimum is available even during those periods.

Likewise, North Carolina's contention that Virginia Beach's project will "reverse the . . . flow" of water in a "small tributary" of Lake Gaston is misleading at best. NC Pet. 4. Like all of Lake Gaston, Pea Hill Cove is a flooded valley. It has some natural inflow, but the great majority of its water flowed from Kerr Reservoir and was backed up by Gaston Dam. Because VEPCO raises and lowers the lake level in its power operations, the flow in Pea Hill Cove "resembles a tide, sometimes flowing into and sometimes flowing out of the cove." DA 3219. The volume of this tide is 17 times greater than Virginia Beach's maximum withdrawal and dwarfs any effect it might have on the direction of stream flow. DA 70.

It also is not true, as RRBA argues, that "FERC itself also concluded that the license amendment could result in an adverse impact on downstream uses." RRBA Pet. 9. In fact, FERC concluded that the project "will not adversely affect water availability in the reservoir area, the upper basin, or the lower basin," DA 3938, "will not affect the reproductive success of striped bass in the Roanoke River," DA 3943, "will have no measurable impact on water quality in the lower Roanoke River," DA 3942, and "would be beneficial, and not deleterious to the environment." DA 3939. FERC's conclusions echoed those of the Corps and the Secretary of Commerce, as affirmed by the Fourth Circuit and the U.S. District Court for the District of Columbia, respectively. *See Hudson III*, 940 F.2d at 64, *aff'g State of North Carolina* v. *Hudson*, 665 F. Supp. 428, 438-39 (E.D.N.C. 1987) (*Hudson I*); *North Carolina* v. *Brown*, 42 E.R.C. 1254, 1247, 1262 (D.D.C. 1995).

ARGUMENT

This case presents no issues of national significance warranting an exercise of this Court's *certiorari* jurisdiction

North Carolina argues that the decision below will have a dramatic impact on the "more than one thousand hydroelectric dams in the United States" by "suspend[ing]" State certification power between the time of licensing and relicensing. NC Pet. 13-14. RRBA goes even further, arguing that the decision eliminates the need for certification even at original licensing or relicensing. RRBA Pet. 13-14.

Those arguments are simply hyperbole, offered to attract this Court's attention to a routine case. In truth, the decision below is consistent with everyone's previous understanding of the way the statute works in a case like this, as was indicated by North Carolina's own conduct; and it will not in any way change the manner in which the nation's hydroelectric projects are regulated. The case would have been significant only if it had been decided the other way, allowing downstream States to veto water uses in upstream States.

This case demonstrates that water withdrawal projects do and will continue to require State certification. There is no practical way to withdraw significant amounts of water from a river or reservoir without building an intake structure, which requires the discharge of dredged and fill materials and therefore requires certification from the State where it is located.[5] This is true for other types of projects that affect water quality as well, and that is why Congress chose the mechanism of a "discharge" as the triggering condition for § 401 certification.

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[5] RRBA's suggestion that withdrawals from a certified intake structure could later be increased without additional certification is incorrect. RRBA Pet. 18 n.16. In this case, for example, Virginia's certification limits Virginia Beach's withdrawals to 60 mgd, and increased withdrawals would require an amended Virginia certification. CWA § 401(d), 33 U.S.C. § 1341(d).

As a practical matter, any new activity that requires a new federal license or permit, and that affects water quality, will also involve a new discharge and a State certification. And in connection with the certification of *new* discharges, Congress provided States with the tools necessary to protect against future *alterations* in discharges that they might find problematic, by imposing conditions under § 401(d), which automatically become conditions on any federal licenses. For example, a State can protect against future changes by imposing minimum stream flow conditions. *See PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 707-08 (1994); 33 U.S.C. § 1341(d). *See also American Rivers, Inc. v FERC*, 129 F.3d 99 (2d Cir. 1997) (holding that FERC may not omit "reopener" conditions in a State's § 401 certification, if it issues a license).[6]

RRBA's suggestion that the Court of Appeals' decision will eliminate the need for State certification at licensing or relicensing is certainly misplaced. This is not a licensing or relicensing case, and the Court of Appeals did not decide whether certifications are necessary at such times. Indeed, that court simply assumed *arguendo* that releases of water through a hydroelectric dam are a "discharge" that would require certification at licensing, and went on to hold that a reduction in such ongoing releases is not a discharge. 112 F.3d at 1187, NC App. 16a. As petitioners assert, there are more than 1,000 hydroelectric projects in the country and many of them soon will be considered for relicensing (including this one, in 2001). Any questions regarding the need for certification at relicensing should be resolved in one

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[6] North Carolina acknowledges that *American Rivers* reaffirmed the "broad scope of State authority under Section 401." NC Pet. 13. But neither *American Rivers* nor *PUD No. 1* nor any other decision, to our knowledge, holds that a State has § 401 authority to veto activities that occur entirely in *another State*, on the rationale argued here or any other. *American Rivers* further demonstrates, however, that under § 401 States have ample authority to protect themselves against adverse effects of future *changes* in a certified project.

of the many cases which involve that issue, and not in this case which does not.

Petitioners' interpretation of § 401 is unprecedented, and North Carolina's own conduct shows that it is contrary to the previous expectations of all concerned parties. Despite its titanic struggle against Virginia Beach's project, North Carolina never suggested that it had § 401 certification authority over the project until May 1994, eleven years after it began opposing the project, more than three years after VEPCO applied for FERC approval of the project, and twelve days after the Secretary of Commerce voided North Carolina's CZMA objection and ruled that Virginia Beach had obtained all necessary § 401 certifications. Obviously, North Carolina itself had no idea that it had § 401 certification authority until its lawyers concocted that theory, after running out of other options, or it would have argued that point to the Secretary and appealed the Secretary's contrary finding.

A decision adopting petitioners' arguments, on the other hand, would have been truly significant, because it would have led to multiple interstate conflicts of the type that Congress sought to avoid by its careful assignment of roles to "source" and "affected" States in §§ 401(a)(1) and (2). *See infra* at 20-22. For example, a diversion from a Montana power company reservoir on the Missouri River in Montana would require certifications from Montana, North Dakota, South Dakota, Nebraska, Louisiana and every other downstream State on the Missouri/Mississippi River system in which a dam is located, because flows through each of those dams would be reduced by the amount of the diversion.[7] "It is unlikely -- to say the least -- that Congress intended to establish such a chaotic regulatory structure" under the Clean Water Act. *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

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[7] North Carolina's counsel conceded this point at oral argument in the Court of Appeals. *See* Transcript of argument, September 9, 1996, at 6 (excerpts reprinted as Appendix B).

The Court of Appeals' decision is not in conflict with any other Circuit

The Court of Appeals' decision does not conflict with the Fourth Circuit's decision in *City of Fredericksburg v. FERC*, 876 F.2d 1109 (1989), and petitioners' pale effort to assign such a conflict shows how far they are grasping for straws. The *Fredericksburg* decision does not consider the meaning of the term "discharge" in § 401, nor does it remotely suggest that a reduction of ongoing flows through a dam could be a statutory discharge.

The issue in *Fredericksburg* was whether a State had waived its right to issue a § 401 certification for construction and operation of hydroelectric generating facilities at an existing dam. The court's holding (that an applicant must request certification in accordance with State filing procedures before there can be a waiver) was based on a FERC regulation, not on the statute. *See id.* at 1111 & n.1. The existence of a discharge was not in dispute; and the opinion does not even identify the discharges that triggered the certification requirement, much less suggest that changes in flows resulting from hydropower operations might be such a discharge. It is clear from the FERC decisions under review in *Fredericksburg*, however, that construction of the new hydropower facilities would involve construction discharges that would certainly require certification, just as Virginia Beach's project did.[8] In short, there is nothing expressed or implied in the Fourth Circuit's decision to suggest that it

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[8] *See Commonwealth Electric, Inc.*, 43 F.E.R.C. (CCH) ¶ 61,300, at 61,819 (1988) (construction of a "rock-core earthen flood control berm across the canal . . . to deflect flood flows from the canal back into the river") and 61,823-24 (license articles 303, dealing with construction of "water retention structures, powerhouse, and water conveyance structures"; 304, "cofferdams and deep excavations"; and 401, "plan to control erosion, dust, and slope stability, and to minimize the quantity of sediment and other potential water pollutants resulting from project construction, spoil disposal and project operation and maintenance").

considered reductions in flow to be triggering discharges under § 401.

Virginia Beach's water withdrawals will not result in any discharge into the navigable waters within the meaning of Section 401(a)(1)

The petitions challenge the Court of Appeals' holding that Virginia Beach's withdrawal of water does not "result in a discharge into the navigable waters" because it adds nothing to the waters. They argue that "result in a discharge" means "result in a discharge *or the alteration of a discharge*," and that the reduction of flow over the dam in North Carolina is the alteration of a discharge. That is not what Congress said or meant.

The Court of Appeals' conclusion, that a "discharge" within the meaning of § 401 "contemplates the addition, not the withdrawal, of a substance or substances," 112 F.3d at 1187, NC App. 17a, follows inescapably from the ordinary meaning of the words Congress used. In ordinary English "discharge" means an "issuing out" or "emission." *Websters New Int'l Dictionary* 644 (3d ed. 1961). "Into" is a preposition which denotes motion or penetration to or of a place or thing from outside the place or thing. *Id.* at 1184. Used together, the words "discharge into" the navigable waters plainly mean the emission of something from outside the waters into the waters -- that is, the addition of something to the waters.[9]

The Court of Appeals found support for this plain language reading of "discharge" in 33 U.S.C. § 1362(12), which defines the term "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any

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[9] FERC analyzed petitioners' argument thus: "We believe that the plain and commonly understood meaning of the phrase 'discharge *into* the navigable waters' (emphasis added) is unduly strained if it is read to include the removal of something that was already in the water, and is particularly strained if it is read to include the removal of the water itself." 77 F.E.R.C. at 61,517, NC App. 115a.

point source." Petitioners argue that in so doing the Court of Appeals equated the term "discharge" with the term "discharge of a pollutant," and thereby improperly narrowed the meaning of the original term. It did no such thing. Instead, the court reasoned that if "discharge of a pollutant" means the "addition of a pollutant," then the word "discharge" must contemplate "addition" of *something*, whether it is a pollutant or not. The court's holding is entirely consistent with the notion that "discharge," without the limiting phrase "of a pollutant," is a broader term than "discharge of a pollutant"; and it simply recognizes that Congress undoubtedly intended that the word "discharge" have the same meaning throughout the Act. *See* 112 F.3d at 1187 n.4, NC App. 17a.

The Court of Appeals' conclusion, that a withdrawal of water is not a discharge, is consistent with *Save Our Community v. U.S.E.P.A*, 971 F.2d 1155 (5th Cir. 1992), which held that removal of water from wetlands by use of a mechanical pump was not a "discharge" requiring a permit under CWA § 404. In that case, the court found that it was unnecessary to resort to legislative history because under the plain language of the statute, "the existence of discharge is critical," and the withdrawal of water is not a discharge. *Id.* at 1163.

Save Our Community confirms the unanimous opinion of federal agencies that a discharge -- a physical *addition* of something *into* "navigable waters" -- is the *sine qua non* of Clean Water Act jurisdiction. *See id.* at 1158 n.6, 1163. That opinion was reiterated in a recent amendment to the Corps' and the EPA's § 404 regulations. 58 Fed. Reg. 45008 (1993). The amendment brought certain land clearing and excavation activities under § 404 for the first time, by defining "discharge of dredged material" as including "[a]ny *addition*, including redeposit, of dredged material, including excavated material, *into* waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation." 33 C.F.R. § 323.2

(d)(iii) (emphases added). In amending the quoted regulation, both the Corps and the EPA adhered to the view that *removing* materials *from* "navigable waters" is *not* a "discharge into" such waters: "EPA and the Corps agree that the presence of a discharge into waters of the U.S. is an absolute prerequisite to an assertion of regulatory jurisdiction under § 404 . . . . [T]his has been the agencies' long-standing position, and we are not altering that view in this rulemaking." 58 Fed. Reg. at 45011.

Petitioners' insistence that this case presents the question of how "altered" discharges should be treated under § 401 is semantic sleight of hand. This case involves a *reduced* discharge. A reduced discharge is an "altered" discharge, to be sure; but it is markedly different from an *increased* discharge -- which also is an altered discharge. An increased discharge may well add a substance to the water by increasing whatever is being discharged into the water, and it would require certification. A reduced discharge does not. The difference is significant. As the Court of Appeals observed, the triggering event selected by Congress for certification is an activity which "results" in or "causes" a discharge, and an activity that reduces a preexisting discharge does not cause the discharge. 112 F.3d at 1188, 1186 n.2, NC App. 18-19a, 15a. Water has continuously discharged through Gaston Dam for 35 years. That discharge will not be increased by Virginia Beach's project, nor will it in any sense "result" from the project.

The Court of Appeals' decision is in no way inconsistent with *PUD No. 1 of Jefferson County v. Washington Dep't. of Ecology*, 511 U.S. 700 (1994). That case involved a FERC license and 401 certification for a *new* dam, which "would divert water from a 1.2 mile reach of the River (the bypass reach), run the water through turbines to generate electricity and then return the water to the River below the bypass reach." 511 U.S. at 708-09. The parties agreed (but the Court did not decide) "that the project will result in two possible discharges," discharges of dredged and fill material during

construction and discharges of water back to the river after the bypass. *Id.* at 711. As the Court of Appeals observed, *PUD No. 1* "never attempted to define a discharge and in no way indicated that an alteration of a discharge was sufficient to invoke the certification requirement of section 401(a)(1)." 112 F.3d at 1188, NC App. 20a. And this case, unlike *PUD No. 1*, does not involve either a new dam or the return of water to a river after a diversion. Water has been discharged from the Gaston Dam for the past 35 years, and the issue here is whether *removing* water, *not* returning it to the river after a bypass, results in a discharge.

The decision below also is consistent with *PUD No. 1*'s recognition that a reduction in water quantity can affect water quality. The question in *PUD No. 1* was whether the State could require minimum stream flows *in the bypass reach*, as a condition of its § 401 certification. The license applicants (petitioners) contended that the minimum flow condition was unlawful because it was unrelated to either of the acknowledged discharges. The Court rejected that argument, holding that § 401(d) authorizes conditions to prevent water quality effects of a project that are *not* caused by a discharge. In so doing, the Court implicitly recognized that a *reduction* in flow caused by a water diversion is *not* a "discharge," even though it may affect water quality. The Court stated:

> If § 401 consisted solely of subsection (a), which refers to a state certification that a 'discharge' will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification authority would have considerable force. Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project.

511 U.S. at 711. The minimum flow condition was *directly* related to the flow reduction caused by the diversion -- it directly *limited* the amount of flow reduction allowed in the bypass reach. If the reduction in flow were a "discharge," the

petitioners' argument would have had no force at all; and it would have been unnecessary for the Court to look to § 401(d) to find authority for the condition. As the dissenting Justices observed in *PUD No. 1*, the Court had to rely on § 401(d) because "[t]he minimum stream flow condition imposed by [the State] in this case has no relation to any possible 'discharge' that might 'result' from [the applicants'] proposed project," and "a minimum stream flow requirement is a limitation on intake — the opposite of discharge." *Id.* at 725.

PUD No. 1 also described the difference between the issues in that case and this one, and the "threshold" limitation that Congress set on States' § 401 certification power:

> Section 401(a)(1) identifies the category of activities subject to certification — namely those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole *once the threshold condition, the existence of a discharge, is satisfied.*

511 U.S. at 711-12 (emphasis added).

The issue here is whether the threshold condition is satisfied. In *PUD No. 1* the threshold condition was conceded, and the issue was whether the State's minimum flow condition was authorized by the statute and appropriate to protect water quality. It was in that context that the Court recognized that a reduction in water quantity could have a water quality effect. But the Court did not suggest that every activity that might have a water quality effect is subject to State certification, whether there is a discharge or not. To the contrary, the Court emphasized that Congress' "threshold condition" of a discharge must be satisfied before any condition could be imposed.

North Carolina argues that the statute contemplates certification when existing discharges are altered because it requires certification from the State where a discharge "originates or will originate," and because "will originate"

must refer to new discharges and "originates" to existing discharges. NC Pet. 16. That argument is insupportable as a matter of logic or of language. It sets up an internal conflict in § 401(a)(1), because § 401(a)(1) applies to activities "which may result in" any discharge, and an activity cannot "result in" a discharge that already exists. It seems obvious that the phrase "originates or will originate" was used because *any* discharge that may result from a federally licensed activity triggers the need for certification -- including any *future* discharge that "will originate" from *operation* of a licensed facility, in addition to (or in the absence of) any discharge that "originates" from *construction* of the facility.

North Carolina's argument that the statutory definition of "pollutant" includes heat, and therefore that a "discharge of a pollutant" could include the addition of heat to the water rather than some "substance," is beside the point. *See* NC Pet. 16. This case does not involve the addition of heat, or anything else, to the water. This case involves a very slight *reduction* in the total volume of flow (but not the low flow) of water through a dam. The fact that the *addition* of heat to water might be the discharge of a pollutant is irrelevant to the question whether this *reduction* in water flow is a discharge.

Any discharge resulting from Virginia Beach's project "originates" in Virginia, not North Carolina; and therefore Virginia has certification authority under Section 401(a)(1) and North Carolina is an "affected" state under Section 401(a)(2)

In the Clean Water Act, Congress sought to leave jurisdiction over water management issues primarily in the hands of the States, which traditionally have jurisdiction over waters within their borders. But Congress recognized that interstate conflicts, like the one presented here, would arise if two or more States had regulatory authority over the same project, and it refused to give any State authority over activities in other States. Its solution was to give each State

authority over *intra*state water quality impacts,[10] and to give the EPA authority over impacts in *other* States.

Congress accomplished this by providing in § 401(a)(1) that a certification is necessary from the State where a discharge "originates," and in § 401(a)(2) that any other State which may be affected by the activity may apply to the EPA to determine whether water quality in that State will be adversely affected. As the Court explained in *International Paper Co. v. Ouellette*, 479 U.S. 481, 490-91 (1987):

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. . . . Significantly, however, an affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters.

In this case, the only discharge resulting from Virginia Beach's project was the discharge of dredged and fill material during construction, and that "originated" in Virginia. But even if the reduction in flow at Gaston Dam were also regarded as a "discharge," as North Carolina contends, that also would "originate" in Virginia, because that is where Virginia Beach withdraws the water. The flow through the

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[10] *See PUD No. 1*, 511 U.S. at 707: § 401 "requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into *intrastate* navigable waters." (Emphasis added.)

dam will be reduced *solely* because Virginia Beach is taking water out of Lake Gaston in Virginia. *Nothing* will be done in North Carolina. The reduction in flow will occur in North Carolina, but it will "originate" from activity in Virginia.

In *National Wildlife Federation v. FERC*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990), the court confirmed that a discharge originates where the activity which causes the discharge occurs, and not where its effects are felt. That case involved a new reservoir located in Oklahoma and Arkansas, behind a dam in Arkansas. The discharge in question was the erosion of soils from the banks of the reservoir *in Oklahoma*. The court upheld FERC's "[c]ommon sense" conclusion that those discharges would originate at the dam, in Arkansas, because that was "where the flow of water would be blocked and consequently the water would be backed up, rather than at some point upstream . . . where the soil eroded as a result."

Here, the statute operated precisely as Congress intended. Virginia, the "source" State where any relevant discharge originated, issued a certification under § 401(a)(1). North Carolina, an "affected" downstream State, asked EPA to require a water quality hearing pursuant to § 401(a)(2). EPA declined, because Virginia Beach's withdrawal will not affect water quality in North Carolina. "This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution." *International Paper*, 479 U.S. at 497. That balance should not be upset; the statute has been and should be applied as it was written.

North Carolina's claim to Section 401 certification authority is barred by the doctrines of *res judicata* and collateral estoppel

As discussed *supra* at 6, Virginia Beach and VEPCO appealed North Carolina's CZMA objection to the Secretary of Commerce. North Carolina defended its objection on the ground, among others, that Virginia Beach's project would

violate the CWA. The Secretary rejected its arguments and found "*that the project meets the requirements of the Clean Water Act,*" and "[t]he City has obtained the necessary CWA federal permit and state certification" for FERC to approve the City's project. DA 1667 (emphasis in original). North Carolina appealed the Secretary's decision, the District Court affirmed, and its decision is final. *North Carolina v. Brown*, 42 E.R.C. 1254 (D.D.C. 1995). Accordingly, North Carolina is barred by the doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) from claiming that its certification also is necessary for FERC to approve the City's project.

Res judicata and collateral estoppel bar relitigation of an administrative agency's decision of disputed issues "which the parties have had an opportunity to litigate," if the agency acted in a "judicial capacity" (as the Secretary of Commerce did here). *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). *See, e.g., Exxon Corp. v. Fischer*, 807 F.2d 842, 846-47, *amended on other grounds*, 817 F.2d 1429 (9th Cir. 1986) (according preclusive effect to Secretary of Commerce's decision in a CZMA appeal). North Carolina undeniably had "an adequate opportunity to litigate" issues under the CWA, including § 401, in the CZMA appeal. *See* 15 C.F.R. § 930.121(c) (Secretary's regulations providing that a CZMA objection will be set aside only if, *inter alia*, "the activity will not violate any requirements of the . . . Federal Water Pollution Control Act"). Likewise, the Secretary undeniably acted in a "judicial capacity." *See Exxon Corp. v. Fischer, supra*, 807 F.2d at 846. North Carolina, Virginia Beach and VEPCO were parties to the CZMA appeal and to the proceeding below, and the Secretary decided the same issue that is presented here -- whether Virginia Beach and VEPCO had obtained the Clean Water Act certification necessary for FERC to approve VEPCO's application.[11]

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[11] RRBA also is bound by the Secretary's adjudication against North Carolina, of course, because "they, in their common public rights as citizens of the State, were represented by the State in those proceedings,

Neither FERC nor the Court of Appeals addressed this argument, because they rejected North Carolina's claim of certification authority on the other grounds advanced in this brief. Nevertheless, North Carolina's claim can and should be rejected on the basis of these preclusion doctrines as well.

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and, like it, were bound by the judgment." *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 341 (1958) (adjudication of state's unsuccessful opposition to FPC dam license was binding on city and citizens of state). *See Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 97-101 (5th Cir.), *cert. denied*, 434 U.S. 382 (1977) (judgment against city declaring ordinance unenforceable against Southwest precluded other airlines from relitigating enforceability of ordinance against Southwest in another court as "private Penforcers"); *Michigan v. Allen Park*, 573 F. Supp. 1481, 1484 n.5 (E.D. Mich. 1983) ("It is established law that when a governmental entity litigates a matter involving diffused private rights . . . , private citizens are bound by the results); 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4458 at 513 (1981) ("government litigation can preclude relitigation by individuals who assert no nore than a general public interest").

CONCLUSION

This case presents no issues of national significance. It involves only the straightforward application of plain statutory language, and it was correctly decided by FERC and the Court of Appeals. This Court should deny the petitions for writ of certiorari and end the fifteen year controversy over Virginia Beach's essential public water supply project.

Respectfully submitted,

Leslie L. Lilley
City Attorney
William M. Macali
Deputy City Attorney
City of Virginia Beach
City Hall Building, Room 260
Municipal Center
Virginia Beach, Virginia 23456
(757) 427-4531

George A. Somerville
(*Counsel of Record*)
Samuel M. Brock III
Mays & Valentine, L.L.P.
1111 East Main Street
Post Office Box 1122
Richmond, Virginia 23218-1122
(804) 697-1291

M. Scott Hart
Mays & Valentine, L.L.P.
4425 Corporation Lane, Suite 420
Virginia Beach, Virginia 23462
(757) 518-3204

Attorneys for Respondent City of Virginia Beach, Virginia

January 21st, 1998

APPENDIX A

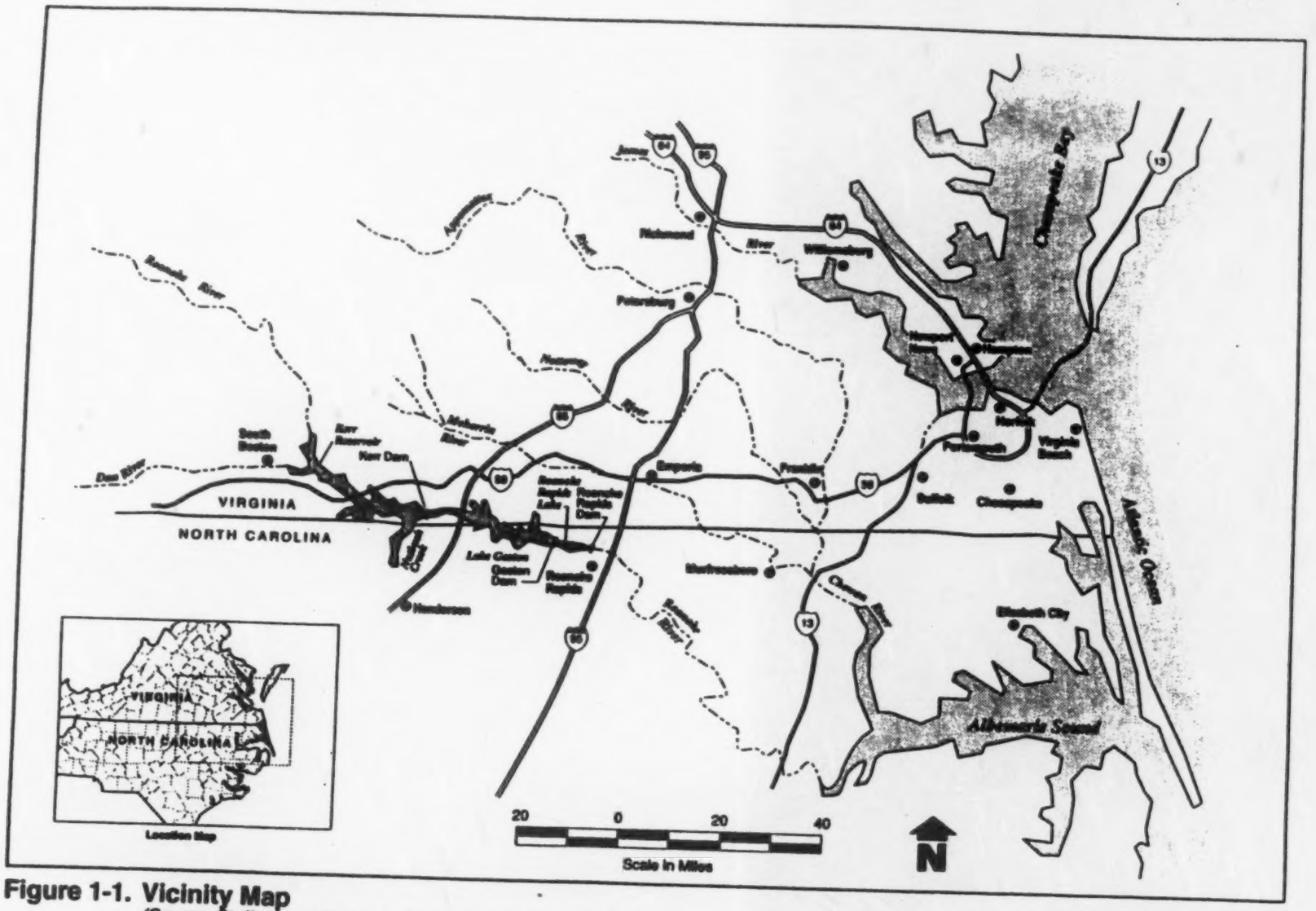

Figure 1-1. Vicinity Map
(Source: Staff, as modified from Corps, 1984 and AAA road map, 1993.)

1-2

DA 3148

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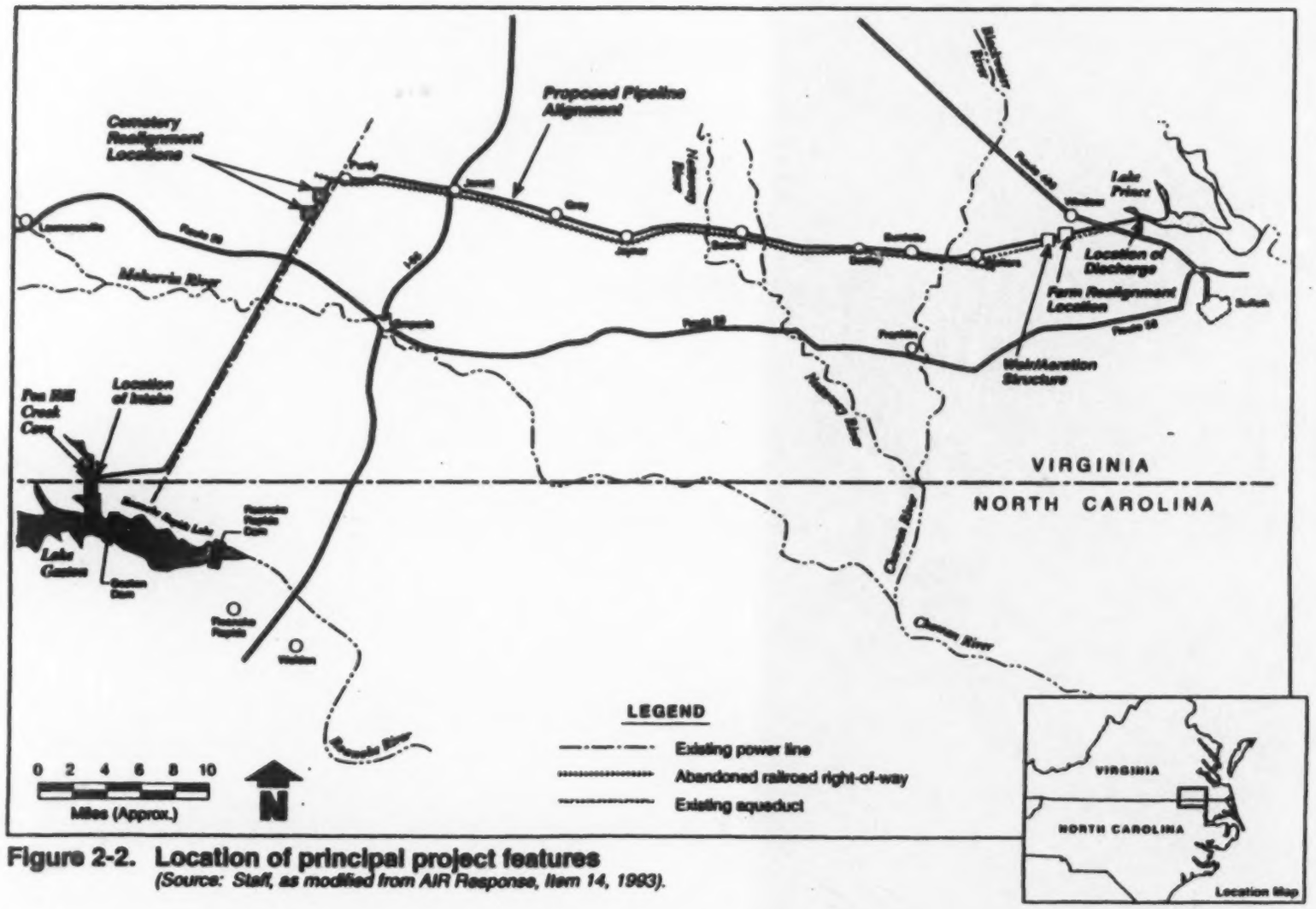

Figure 2-2. Location of principal project features
(Source: Staff, as modified from AIR Response, Item 14, 1993).

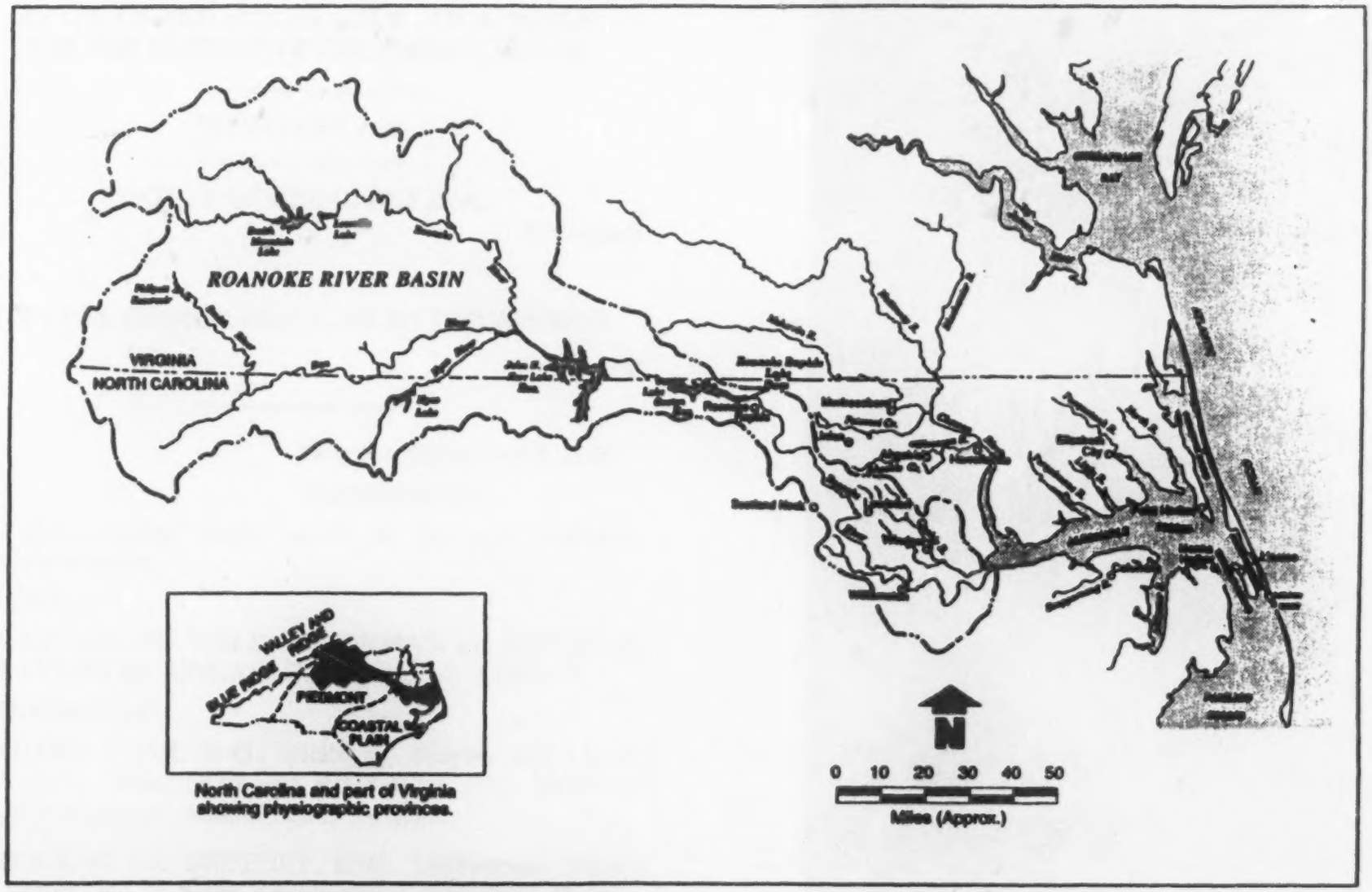

Figure 3-1. Location of the Roanoke River basin
(Source: Staff, as modified from USGS, 1993.)

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 905-1494 *et al.*

STATE OF NORTH CAROLINA,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Monday, September 9, 1996

Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice,

BEFORE:

CIRCUIT JUDGES WALD, SILBERMAN and SENTELLE, U. S. COURT OF APPEALS FOR THE D. C. CIRCUIT.

APPEARANCES:

BERNARD NASH, ESQ., Dickstein, Shapiro and Morin, LLP, 2101 L Street, Northwest, Washington, D.C. 20037; on behalf of Petitioner, State of North Carolina.

PATRICK M. MC SWEENEY, ESQ., McSweeney, Burtch and Crump, PC, 11 South Twelfth Street, Richmond, Virginia 23212; on behalf of Petitioner, Roanoke River Basin Association.

EDWARD S. GELDERMANN, ESQ., Federal Energy Regulatory Commission, 888 First Street, Northeast, Washington, D.C. 20426; on behalf of Respondent.

M. SCOTT HART, ESQ., Mays and Valentine, Nations Bank [sic] Center, 1111 East Main Street, Richmond, Virginia 23208; on behalf of the Intervenors.

* * *

MR. NASH: Section 401 of the Clean Water Act requires any application for any discharge, for any activity that will result in a discharge originating in a state to be certified.

QUESTION: We're doing great so far. We're doing real good so far. What is it in this case that makes the--

MR. NASH: In this case, it is the altered operation of the hydroelectric facility at the Lake Gaston Dam.

QUESTION: Why isn't that taken care of in 401(2), which deals with the downstream implications of an original discharge and allows a state that is affected by the downstream implications of that certain rights and et cetera, et cetera? Why is the argument which, I take it, you're making that any time something happens in one state where there is at least one origination of a discharge and it gets--that results in a lower flow. Say, it went through seven different states and the flow got low in every one of those states.

Would you say they came under--you had to be certified because the flow got less and less?

MR. NASH: There is a total different--the answer is yes. There is a total different operation at the Lake Gaston hydroelectric project. FERC required an amendment to be filed to the license to operate it.